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No. 97-1056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NAOMI MARQUEZ,

Petitioner,

v.

SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Does a union breach its duty of fair representation when it negotiates and maintains a compulsory unionism provision that, on its face, requires—misleadingly—that an employee be "a member of the Union" and pay the periodic dues and initiation fee "uniformly required as a condition of acquiring membership," even though those requirements cannot lawfully be enforced as a condition of employment?

II. Does the National Labor Relations Board have exclusive jurisdiction over a performer's claim that a union breached its duty of fair representation by negotiating and maintaining a compulsory unionism provision that misleadingly requires payment of dues as a condition of employment after thirty days of "employment as a performer in the motion picture industry"? If the Board does not have exclusive jurisdiction over this claim, did the union breach its duty of fair representation by negotiating and maintaining that provision?

III. Is the employer a necessary party to a suit for breach of the duty of fair representation where an employee seeks reformation or expungement of a collective bargaining agreement provision alleged to be facially invalid?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is under review. No counsel of record has appeared in this Court for Respondent Lakeside Productions, Inc. ("Lakeside"), which was a defendant in the district court and an appellee in the court of appeals. Lakeside's lead counsel in the proceedings below informed Petitioner's counsel, after the writ of certiorari was granted, that Lakeside did not intend to participate in determining the contents of the Joint Appendix, file a brief, or participate in oral argument in this Court. Consequently, no counsel of record for Lakeside is identified on the cover of the Joint Appendix. However, Lakeside still has a legal interest in the outcome of, and thus is a party to, the proceedings in this Court, because Question III on which certiorari was granted is whether Lakeside is a necessary party to this action.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The court of appeals' opinion is officially reported at 124 F.3d 1034 and reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at page 1a. The unreported opinion of the United States District Court for the Western District of Washington is reprinted in the Petition Appendix at page 22a.

JURISDICTION

The court of appeals entered its judgment on August 29, 1997. (Joint Appendix ("J.A.") at 57.) On November 6, 1997, Justice O'Connor granted Petitioner's timely application for an

extension of time within which to file a petition for certiorari. Justice O'Connor extended the time, as computed under Supreme Court Rule 30.1, to and including December 29, 1997. The Petition for a Writ of Certiorari was timely filed on December 24, 1997. This Court has jurisdiction under 28 U.S.C.A. § 1254(1) (West 1993).

STATUTORY PROVISIONS INVOLVED

This case involves sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 158(a)(3) and 158(b)(2) (1988). Their pertinent text is set out in the Appendix to the Petition for Certiorari at page 35a.

STATEMENT OF THE CASE

This case involves the construction and application of NLRA section 8(a)(3)'s authorization of compulsory unionism requirements in collective bargaining agreements.

As pertinent here, this is a civil action for breach of the duty of fair representation under section 9(a) of the Act, 29 U.S.C. § 159(a) (1988), an act of Congress regulating commerce. Petitioner Naomi Marquez ("Ms. Marquez"), therefore, contends that the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) (1988) and section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185 (1988). The district court and court of appeals exercised jurisdiction over some of her unfair representation claims, (*see* Pet. App. at 6a-10a, 13a-19a, 28a-30a), but held that others are subject to the exclusive jurisdiction of the National Labor Relations Board ("Board" or "NLRB"), (*see id.* at 10a-13a, 30a-31a).[1]

[1] The lower courts also dismissed alleged violations of implied terms of the collective bargaining agreement between Respondents. (*See* Pet. App. at 19a-21a, 31a-32a.) Ms. Marquez does not here pursue those claims.

I. The Facts.

Ms. Marquez is a part-time actress. Respondent Lakeside Productions, Inc. ("Lakeside") produced a television series called "Medicine Ball." It is an employer within the meaning of the NLRA, 29 U.S.C. § 152(2) (1988). Respondent Screen Actors Guild, Inc. ("SAG") is a labor organization within the meaning of the NLRA, 29 U.S.C. § 152(5) (1988). It was the exclusive bargaining agent for performers engaged by Lakeside for "Medicine Ball." (Pet. App. at 1a-2a.)

In July 1994, Lakeside and SAG entered into a collective bargaining agreement ("CBA") containing a "union security" provision. (*Id.* at 23a.) That provision required every performer employed by Lakeside to "be a member of the Union in good standing" and "tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union," if they had previously been employed "as a performer in the motion picture industry" (but not necessarily by Lakeside) thirty days or more before beginning employment by Lakeside. (J.A. at 28-29.)[2]

According to SAG's Assistant Hollywood Executive Director of Legal Affairs, (*id.* at 48), SAG knew when it entered into this agreement with Lakeside that it could not lawfully require membership as a condition of employment. SAG also knew that performers had a right under *Communications*

[2] The exact language concerning the payment of dues and initiation fee was that the

> Producer shall not be held to have violated this paragraph if it employs a performer who is not a member of the Union in good standing, . . . if the Producer has reasonable grounds for believing that membership in the Union was denied . . . or . . . terminated for reasons other than the failure of the performer to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union . . . .

(J.A. at 29.)

Workers v. Beck, 487 U.S. 735 (1988), to pay less than the full dues and initiation fee. (*Id.* at 43-44, 49.)

On August 29, 1994, Ms. Marquez auditioned for a small part in an episode of "Medicine Ball." Lakeside offered her the part, and she accepted. However, Lakeside and SAG also had an agreement that required Lakeside to clear all performers with "Station 12," a department of SAG, as to their compliance with the "union security" provision before employment began. Lakeside's casting director's office, therefore, called Station 12 to clear Ms. Marquez. (Pet. App. at 2a.)

Ms. Marquez was not a SAG member. (*Id.* at 24a.) However, she had worked for another company on a production covered by a SAG agreement for more than a month in 1989. Consequently, Station 12, at the least, informed Lakeside that Ms. Marquez must pay SAG's initiation fee and dues before she could be cleared to work in "Medicine Ball." (*Id.* at 2a-3a.) "The record contains conflicting evidence with regard to whether SAG representatives impermissibly asserted that Marquez was required to 'join' the union before she would be eligible to work or whether the term used was must 'pay' the union." (*Id.* at 14a.)

When she learned that she must pay SAG before she could work, Ms. Marquez called SAG's Seattle office and asked what it cost to join. She was told that the fee was about $500.00. Ms. Marquez then notified her talent agents that she did not have the necessary money. Lakeside would have paid Ms. Marquez $550.00 for doing the part, but not until thirty days after her performance. (*Id.* at 3a.)

Over the next few days, Ms. Marquez's agents tried to solve her problem in several telephone calls to Lakeside, its casting office, and SAG. However, SAG continued to insist that Ms. Marquez pay before being cleared for work and would not permit her to pay after Lakeside paid her for acting in "Medicine

Ball." (*Id.* at 3a-4a.)[3] SAG also never told Ms. Marquez that she had a right under *Beck* to object and pay only that portion of dues and fees that represents collective bargaining costs. (*Id.* at 17a-18a; J.A. at 46.)

Lakeside had scheduled filming of Ms. Marquez's role for September 8, 1994. When she did not pay SAG the demanded dues and initiation fee before its deadline on September 7, Lakeside replaced her with another actress. Lakeside filmed the part as scheduled on the 8th. (Pet. App. at 4a.)

II. Proceedings Below.

Ms. Marquez filed her Complaint against SAG and Lakeside in December 1994. It stated two causes of action: breach of the duty of fair representation and breach of implied terms of the collective bargaining agreement. (J.A. at 9-10.) Only the first claim is relevant to this Petition.

Ms. Marquez's first claim for relief is that SAG breached the duty of fair representation it owed her by negotiating and enforcing the compulsory unionism provision of its collective bargaining agreement with Lakeside. She alleges that SAG breached that duty because that provision, on its face and as applied, (a) required union membership, (b) did not provide a thirty-day "grace period" after employment by Lakeside before any obligations to SAG arose, and (c) did not limit an employee's obligation to payment of a fee to defray SAG's costs of collective bargaining, contract administration, and grievance adjustment. (*Id.* at 9-10.) This claim also alleges that SAG violated its duty of fair representation by failing to advise Ms. Marquez truthfully of her rights and obligations under the NLRA, including her rights under *Beck*. (*Id.* at 10.)

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[3] After SAG learned that Ms. Marquez had obtained legal counsel, SAG faxed a letter to Lakeside saying that it did not object to her working. However, this letter arrived after Lakeside had already replaced Ms. Marquez. (Pet. App. at 3a-4a.)

The parties filed cross-motions for summary judgment. (*Id.* at 21-25, 47, 50.) The district court granted Defendants' motion on all claims, and denied Ms. Marquez's. It ruled that SAG did not breach the duty of fair representation by negotiating and enforcing the requirements of full "membership" and payment of full dues. (Pet. App. at 28a-30a.) The court held that Ms. Marquez's unfair representation claims concerning the employment-in-the-industry provision are "preempted by the exclusive jurisdiction of the National Labor Relations Board." (*Id.* at 30a-31a.) The court also rejected the breach of contract claims. (*Id.* at 31a-32a.)

Ms. Marquez timely appealed. (J.A. at 56.) The court of appeals reversed the summary judgment as to her claims that SAG's enforcement of the compulsory unionism provision breached the duty of fair representation. The court found genuine issues of fact material to those claims. It also reversed because the district court failed both to address Ms. Marquez's allegation that SAG's failure to notify her of her *Beck* rights breached the duty and to analyze the enforcement claims "under the arbitrariness standard of *Vaca*" *v. Sipes*, 386 U.S. 171 (1967). The court of appeals remanded the case for resolution of those claims. (Pet. App. at 13a-19a.)

However, the court of appeals affirmed "the district court's conclusion that SAG did not breach its duty of fair representation by negotiating a CBA which requires covered actors to be members of the union in good standing." (*Id.* at 6a-10a.)

The court acknowledged that, under this Court's decisions in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and *Beck*, "unions can require no more than payment of initiation fees and dues covering a 'financial core' of services provided to all employees . . . limited to expenditures germane to 'collective bargaining, contract administration, and grievance adjustment.'" (Pet. App. at 7a (quoting *Beck*, 487 U.S. at 745).) Nonetheless, the court followed decisions of two other circuits that "held that terms requiring union 'membership' continue to be permissible under federal law." (*Id.* at 8a (citing *Electronic Workers v.*

NLRB, 41 F.3d 1532 (D.C. Cir. 1994), and *Nielsen v. Machinists Local 2569*, 94 F.3d 1107 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1426 (1997).) The court recognized that its decision on this issue conflicts with *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994), citing *Bloom* as contrary to *Electronic Workers* and *Nielsen*. (Pet. App. at 8a.)

In considering Ms. Marquez's claim that the employment-in-the-industry provision on its face breached the duty of fair representation, the court of appeals conceded that "[d]iscerning a principled distinction between a disguised unfair labor practices claim and a straightforward breach of duty claim is no simple matter." (*Id.* at 12a.) However, the court nevertheless affirmed "the district court's conclusion that Marquez's challenge to the CBA's 30 day term is preempted by the NLRB's exclusive jurisdiction." (*Id.* at 10a-13a.)

Finally, in the portion of its opinion "affirm[ing] the district court's dismissal of the breach of contract claim," (*id.* at 19a-21a), the court of appeals rejected Ms. Marquez's contention that "Lakeside is implicated in SAG's alleged failures in fairly representing her" and is "a necessary party to obtain full relief through contract reformation." (*Id.* at 20a.)

SUMMARY OF ARGUMENT

Question I: In *Communications Workers v. Beck*, this Court established that a union breaches the duty of fair representation if, in negotiating or enforcing a compulsory unionism agreement, it requires more of employees than NLRA section 8(a)(3), as construed by the Court, permits. Even before *Beck*, the Court had long held that union membership cannot be a requirement of employment under section 8(a)(3), despite that section's use of the term "membership." And, in *Beck*, the Court held that section 8(a)(3) does not allow a union to require payment of more than a prorated share of its collective bargaining costs.

Consequently, a union breaches the duty of fair representation if, as SAG did here, it negotiates and maintains a "union

security" provision that purports to require full union membership and full union dues. Negotiation of such an agreement is arbitrary conduct, because it is wholly irrational to negotiate an agreement that cannot be enforced as written, is plainly contrary to the Act's policy of voluntary unionism, and requires employees to consult extraneous sources to discover their true rights and obligations. Negotiation of such a provision is also *per se* bad faith conduct, because "the ***only*** realistic explanation for the retention of the statutory language in collective bargaining agreements . . . is to mislead employees about their right not to join the union." *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986, 990 (7th Cir. 1997) (opinion by Posner, C.J.) (emphasis added).

Question II: The "union security" provision here also purported to require membership in SAG after thirty days of employment "as a performer in the motion picture industry." That requirement violates section 8(a)(3)'s first proviso, which guarantees employees a ***separate*** thirty-day grace period with each employment before they can be forced to comply with a compulsory unionism agreement.

The NLRB's exclusive jurisdiction over unfair labor practice charges never preempts a federal court's jurisdiction over an unfair representation claim. Therefore, because the negotiation of a compulsory unionism agreement that misrepresents employees' obligations breaches the duty of fair representation under *Beck*, Ms. Marquez's claims regarding the employment-in-the-industry clause are not preempted. The court of appeals properly exercised jurisdiction over her claims that the union breached the duty of fair representation by negotiating a provision that misrepresents the extent of employees' obligations and by statements outside the bargaining agreement misrepresenting when Ms. Marquez's obligations began. No principled basis exists for distinguishing those claims from the claim that the union also breached the same duty by its misrepresentations in the agreement about when Ms. Marquez's obligations began.

Question III: The appropriate remedy for both breaches of the duty of fair representation that inhere in the compulsory unionism provision here includes reformation of the contract to expunge those portions of the provision that misleadingly overstate employees' obligations. Therefore, as in any other case, including a suit for breach of the duty of fair representation, in which reformation of a contract is sought, both parties to the agreement are necessary parties to the action. The employer should not have been dismissed from this case.

ARGUMENT

I. A Union Breaches Its Duty of Fair Representation When It Negotiates and Maintains a Compulsory Unionism Provision That Falsely Requires Full Membership and Payment of Full Union Dues as a Condition of Employment, Although Those "Requirements" Cannot Lawfully Be Enforced.

To deal with the danger that unions might abuse the statutory privilege of exclusive representation, this Court has interpreted the federal labor statutes as imposing a duty of fair representation upon bargaining agents. The Court first found the duty under section 2, Fourth of the Railway Labor Act, 45 U.S.C. § 152, Fourth (1988), in *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944). It later applied the same duty under section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1988), in *Ford Motor Co. v. Huffman* because of the two labor statutes' "comparable provisions" for exclusive representation. 345 U.S. 330, 337 (1953).

The duty of fair representation is "akin to the duty owed by other fiduciaries to their beneficiaries." *Air Line Pilots v. O'Neill*, 499 U.S. 65, 74 (1991). That duty "require[s] the union, in collective bargaining and in making contracts with the [employer], to represent non-union or minority union members of the [bargaining unit] without hostile discrimination, fairly,

impartially, and in good faith." *Steele*, 323 U.S. at 204.[4] In general, "a union breaches its duty of fair representation if its actions are either 'arbitrary, discriminatory, or in bad faith.'" *O'Neill*, 499 U.S. at 67 (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)).

A union's duty of fair representation generally includes an obligation to give nonmembers notice of proposed union action that could result in their discharge. *See Steele*, 323 U.S. at 204. In the specific context of a compulsory unionism provision, the "obligation of fair dealing . . . includes the duty to inform the employee of his ***rights*** and obligations so that the employee may take all necessary steps to protect his job." *Electrical Workers Local 801 v. NLRB*, 307 F.2d 679, 683 (D.C. Cir.) (opinion by Burger, J.) (emphasis added), *cert. denied*, 371 U.S. 936 (1962); *cf. Teachers Local 1 v. Hudson*, 475 U.S. 292, 306 (1986) ("[b]asic considerations of fairness . . . dictate" that a union give employees "sufficient information to gauge the propriety of the union's fee" so that they may decide whether to object to paying for nonbargaining activities).

Abrams v. Communications Workers identified the necessary criterion for determining whether a union breaches its fiduciary duty in negotiating or enforcing a union or agency shop agreement: "A union's fair representation duty in the context of a mandatory agency fee hinges on its compliance with section 8(a)(3) of the NLRA." 59 F.3d 1373, 1377 (D.C. Cir. 1995).[5] This holding follows logically from the obvious fact that,

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[4] "The parties do not dispute that the duty of fair representation extends to Marquez, a job applicant." (Pet. App. at 28a n.2.) *See NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450, 452 (1995); *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 87-90 (1989).

[5] The "term 'agency shop' applies to an arrangement under which all employees are required as a condition of employment to pay dues to the union and pay the union's initiation fee, but they need not actually become (continued...)

in negotiating and enforcing a compulsory unionism agreement, a union acts in its own interest and against the interests of employees who are not voluntary members.

Thus, if an exclusive representative attempts to require more of employees than section 8(a)(3) allows in negotiating or enforcing a compulsory unionism agreement, it acts arbitrarily. "Viewed in light of the legal landscape," such conduct "can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary,'" *O'Neill*, 499 U.S. at 78-79 (quoting *Huffman*, 345 U.S. at 338) (citation omitted).

This proposition necessarily follows from *Communications Workers v. Beck*, 487 U.S. 735 (1988). *Beck* decided a claim by nonmembers that a union "failed to represent their interests fairly and without hostility by negotiating and enforcing an agreement that allows the exaction of funds for purposes" unrelated to collective bargaining. *Id.* at 743. *Beck* determined that claim of unfair representation in the employees' favor, holding that section 8(a)(3) "authoriz[es] the collection of only those fees necessary to finance collective-bargaining activities," *id.* at 759. *See id.* at 744-63.[6]

Yet, *Beck* did not even discuss whether the union there acted in bad faith. Since bad faith depends upon the particular facts of

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[5] (...continued)
union members." *NLRB v. General Motors Corp.*, 373 U.S. 734, 736 (1963). However, under "§ 8(a)(3), the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues." *Pattern Makers v. NLRB*, 473 U.S. 95, 106 n.16 (1985). Thus, a "union shop" is the "practical equivalent" of an "agency shop." *General Motors*, 373 U.S. at 743.

[6] *See also Beck*, 487 U.S. at 742-44, 761-62 (holding that the courts had jurisdiction to decide the nonmembers' unfair representation and constitutional claims, and finding it unnecessary to address the latter).

a case, *Beck* must implicitly have concluded that negotiation or enforcement of a compulsory unionism provision exceeding the limits of section 8(a)(3) is *per se* arbitrary conduct.

Moreover, if the requirement imposed is clearly unlawful on the face of section 8(a)(3) or under authoritative preexisting case law, then the union's conduct is both arbitrary ***and*** in bad faith. As bargaining representative, the union—a "fiduciary"—has a duty to know the law that governs its conduct in that capacity.

The duty of fair representation "applies to all union activity, including contract negotiation." *O'Neill*, 499 U.S. at 67; *see Beck*, 487 U.S. at 743. Here, SAG breached the duty by negotiating and maintaining a collective bargaining agreement with Lakeside containing a "union security" provision that on its face purported to require full union membership and payment of full dues and initiation fee, because section 8(a)(3), as authoritatively interpreted by this Court, prohibits both requirements. That the language of the agreement tracks the literal language of the statute does not avoid the breach. As a fiduciary, the "union may not treat as adversaries" the employees it represents, but has a duty to specify their true obligations in language they can understand. *See Electrical Workers Local 801*, 307 F.2d at 683.

A. Because This Court Has Held Full Membership Requirements Unlawful Since 1954, the Only Possible Purpose of Agreements Stating That Membership Is Required Is to Mislead Employees.

Section 8(a)(3) forbids "discrimination [by an employer] in regard to hire or tenure of employment . . . to encourage . . . membership in any labor organization." 29 U.S.C. § 158(a)(3). But for two provisos to the section, "all union-security clauses would fall within this otherwise broad condemnation." *Beck*, 487 U.S. at 744.

Section 8(a)(3)'s first proviso permits an employer to make "an agreement with a labor organization . . . to require as a condition of employment membership therein." 29 U.S.C.

§ 8(a)(3), 1st proviso. However, the second proviso limits the first. It provides that an employer may not discriminate against an employee for nonmembership in a union "if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure . . . to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3), 2d proviso, pt. (B).

Since 1954, it has been clear from this Court's decisions that, under the latter proviso, "union security agreements cannot be used for 'any purpose other than to compel payment of union dues and fees.'" *Pattern Makers v. NLRB*, 473 U.S. 95, 106 n.16 (1985) (quoting *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954)). "Under the second proviso to § 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963) (citing *Radio Officers*). In short, at least since 1954, "[f]ull union membership . . . no longer can be a requirement of employment." A congressional "policy of voluntary unionism" is "implicit in § 8(a)(3)." *Pattern Makers*, 473 U.S. at 104-06.

Consequently, a bargaining agreement that requires all employees, as a condition of employment, to "be full-fledged Union members" "assert[s] the existence of a non-existent and non-permissible requirement." *Service Employees Local 680 v. NLRB*, 601 F.2d 980, 981-82 (9th Cir. 1979). SAG had known for "several years" that it could not require an employee to be a member "in good standing." (J.A. at 49, ¶ 5; *id.* at 43.) Yet, the first sentence of the provision that SAG entered into with Lakeside in July 1994 purported to require precisely that: "Every performer . . . shall be ***a member of the Union*** in good standing." (*Id.* at 28 (emphasis added).)

Such a clause is unlawful on its face, as the Sixth and Eighth Circuits have held. *Buzenius v. NLRB*, 124 F.3d 788, 791-93 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3427 (U.S. Dec. 8, 1997) (No. 97-945); *Bloom v. NLRB*, 30 F.3d

1001, 1003-05 (8th Cir. 1994); *accord Schreier v. Beverly Cal. Corp.*, 892 F. Supp. 225, 226-27 (D. Minn. 1995). "To permit the CBA to say what it cannot literally mean does violence both to the Act's policy of voluntary unionism and to principles of contract interpretation." *Buzenius*, 124 F.3d at 792.

First, a compulsory unionism provision requiring "membership in good standing" or "membership" "is inconsistent with the Act's policy of voluntary unionism because it misleads employees into believing that they may not exercise free choice in the matter of union membership." *Id.* at 792-93. An "employee who is unfamiliar with the Supreme Court cases discussing union security provisions is likely to conclude that the clause requires exactly what it says." *Bloom*, 30 F.3d at 1005.[7]

Second, a compulsory unionism provision requiring "membership in good standing" or "membership" "turns normal contract interpretation on its head." "[E]mployees must consult extraneous sources and subsequent notices in order to discover that they have a right not to do what the plain language of the clause requires." *Buzenius*, 124 F.3d at 793.

Notice of employees' true rights from extraneous sources or separate notices is insufficient, because "the union-security

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[7] As the NLRB's current Chairman has recognized, "even today, many workers and employers do not understand that 'membership' is what the Supreme Court has defined it to be in its 1963 *General Motors* holding." *Group Health, Inc.*, 325 N.L.R.B. No. 49, slip op. at 5 (Jan. 30, 1998) (Gould, Chairman, concurring), *petition for review pending*, No. 97-1582 (8th Cir.); *see Electronic Workers Local 444*, 311 N.L.R.B. 1031, 1040 (1993), *rev'd in part on cross-petitions for review & enforcement*, 41 F.3d 1532 (D.C. Cir. 1994); Dan C. Heldman et al., *Deregulating Labor Relations* 69 (1981); Thomas R. Haggard, *Compulsory Unionism, the NLRB, and the Courts* 70 (U. Pa. Wharton Sch. Indus. Res. Unit Lab. Rel. & Pub. Pol'y Series Report No. 15, 1977); Norman L. Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61, 61 n.2 (1983); Harry H. Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1057-58 (1976).

clause, which cannot mean what it says and cannot be applied as drafted, remains in the CBA, the on-going contract by which the employees' relationship to the employer is governed." *Id*; *see Bloom*, 30 F.3d at 1005. A separate notice "is not adequate where the collective-bargaining agreement sends a contrary message and instruction to employees within the bargaining unit." *Monson Trucking, Inc.*, 324 N.L.R.B. No. 149, slip op. at 8 (Oct. 31, 1997) (Gould, Chairman, concurring).

Thus, negotiation of a provision that requires full union membership is *per se* arbitrary and breaches the duty of fair representation, no matter whether the union enforces it as written. It is clearly irrational to negotiate a clause that "assert[s] the existence of a non-existent and non-permissible requirement," *Service Employees Local 680*, 601 F.2d at 982.

Moreover, negotiation of such a clause is also *per se* bad faith conduct, because "the only realistic explanation for the retention of the statutory [membership] language in collective bargaining agreements . . . is to mislead employees about their right not to join the union." *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986, 990 (7th Cir. 1997) (opinion by Posner, C.J.); *accord Buzenius*, 124 F.3d at 793; *see Bloom*, 30 F.3d at 1004. A "union owes employees a duty to represent them . . . ***honestly*** and in good faith." *O'Neill*, 499 U.S. at 75 (emphasis added). A union, like SAG, that negotiates and maintains an agreement falsely stating that "membership" is necessary, when it knows it cannot enforce that requirement, has not represented employees honestly.

B. Agreements Defining "Membership" as the Payment of Full Union Dues Misleadingly Suggest That Payment Makes Employees Full Members and That Full Dues Must Be Paid, Contrary to This Court's Decision in *Communications Workers v. Beck*.

Besides requiring membership "in good standing," the "union security" provision here said, in subsection B, that the

> Producer shall not be held to have violated this paragraph if it employs a performer who is not a member of the Union in good standing, . . . if the Producer has reasonable grounds for believing that membership in the Union was denied . . . or . . . was terminated for reasons other than the failure of the performer to tender ***the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union*** . . . .

(J.A. at 29 (emphasis added).)

This convoluted clause "cannot cure the defect of the opening sentence" of the compulsory unionism provision. "[H]aving misinformed employees of their obligations in the first sentence, [the union cannot] adequately remedy the unlawful effect in the 'fine print.'" *Group Health, Inc.*, 325 N.L.R.B. No. 49, slip op. at 8 (Jan. 30, 1998) (Brame, Member, dissenting), *petition for review pending*, No. 97-1582 (8th Cir.). Moreover, subsection B, too, is unlawfully misleading on its face, for two reasons.

First, this language does not clarify that a performer need ***not*** be a member ***at all***. "Nowhere does the clause inform, or even suggest to employees, that they may choose to be *nonmembers*." Instead, it suggests that payment of dues and the initiation fee ***makes*** a performer a member. *See id.*[8] The court in *Schreier*

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[8] Respondents' current agreement suffers from the same defect. The "union security" clause has been amended, but it still requires a performer to "be a member of the Union in good standing," defined as "a person who offers to pay (and, if the Union accepts the offer, pays) union initiation fees and dues as financial obligations in accordance with the requirements of the National Labor Relations Act." (J.A. at 28, 53-54.) Thus, employees are still likely to be misled into believing that they must (continued...)

held the agreement there facially invalid despite similar language. That agreement defined membership "'in good standing'" as "'payment of a standard initiation fee and standard regular monthly dues.'" 892 F. Supp. at 226-27; *see also Wegscheid*, 117 F.3d at 990 ("retention of the statutory language in collective bargaining agreements . . . [will] mislead employees about their right not to join the union").

Second, that the agreement here required "the performer to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership," (J.A. at 29), means that on its face it purported to require payment of more than section 8(a)(3) permits under *Beck*. SAG therefore breached the duty of fair representation in that respect as well.

In *Bloom*, the Eighth Circuit reversed a NLRB-approved settlement agreement requiring a union and employer

> to post notices informing employees that they would "no longer give effect to the provision in [the] contract . . . that requires employees become and remain 'members in good standing' as a condition of continued employment unless such provision also provides that employees need only pay the Union's periodic dues and initiation fees."

30 F.3d at 1002, 1004 (alteration in original). This notice was "not sufficient to protect [the] employees' . . . right to refrain from union activities," because, under *Beck*, employees "cannot be obligated as a condition of their employment to pay *all* union dues and initiation fees, as the above notice seems to imply." *Id.*

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[8] (...continued)
be members and pay full fees and dues, because the clause does not mention the options of being a nonmember and paying only collective bargaining costs (options the union ***must*** "accept" if chosen by employees).

at 1004-05. The court held that "an adequate remedy . . . requires expunction of the offending clause." *Id.* at 1005.

Similarly, in *Schreier*, a suit for breach of the duty of fair representation, the agreement required "'payment of a standard initiation fee and standard regular monthly dues.'" 892 F. Supp. at 226-27. The court held that the "union security clause is facially invalid under section 8 of the [NLRA] because it requires more from the plaintiff than can be required under the *Beck* and the *Bloom* cases." *Id.* at 226 (citation omitted). The court concluded, "[a]s was done in *Bloom*, therefore, the judgment must expunge the unlawful provision in the collective bargaining agreement." *Id.* at 227. *See also Buzenius*, 124 F.3d at 793 (the NLRB abused its discretion in refusing to order that a compulsory unionism clause be either removed from the collective bargaining agreement or modified to explain that employees have a "right to refuse to join the Union or pay full dues, so long as they pay that portion of dues related to core representational activities").

At the least, a union acts arbitrarily in negotiating a compulsory unionism provision that is facially invalid under this Court's authoritative case law interpreting section 8(a)(3). *See supra* pp. 9-12. *Beck* controls on this issue, and SAG was aware of its holding "[p]rior to the events which gave rise to this lawsuit." (J.A. at 43-44.) Therefore, SAG breached its duty of fair representation by, six years after *Beck*, negotiating a provision that on its face misleadingly "asserted the existence of a [second] non-existent and non-permissible requirement," *Service Employees Local 680*, 601 F.2d at 982, *i.e.*, payment of full union dues and initiation fee. As with the term "membership," "the only realistic explanation for the retention of the statutory language in collective bargaining agreements . . . is to mislead employees about their right not to join the union" and not to "pay the full union dues." *Wegscheid*, 117 F.3d at 990.

C. Those Lower Court Decisions Permitting Misleading Compulsory Unionism Provisions Are Irrational and Misapplied This Court's *Beck* Decision.

The court of appeals engaged in no independent analysis in ruling that the "union security" provision in SAG's agreement with Lakeside did not breach the duty of fair representation. It merely relied on *Electronic Workers v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994), and *Nielsen v. Machinists Local 2569*, 94 F.3d 1107 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1426 (1997). (*See* Pet. App. at 8a-10a). Like the court of appeals' decision, those earlier decisions are wrong.[9]

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[9] In *Wegscheid*, another panel of the Seventh Circuit indicated that it would have reached a result contrary to *Nielsen* in an appropriate case. *Wegscheid* was an employees' suit alleging that their exclusive bargaining agent breached the duty of fair representation by negotiating and enforcing a compulsory unionism provision that did "not advise the employees of their right (announced in *Beck*) not to join the union and instead to pay only an agency fee." 117 F.3d at 988. The court held that the facial challenge to the provision was "moot," because a settlement of the enforcement count of the complaint gave the plaintiffs "all the relief that *they* need to protect themselves against being misled" by "the objectionable language in the collective bargaining agreement." *Id.* at 990.

However, the *Wegscheid* court also "emphasize[d]," inconsistently with *Nielsen*, that:

> nothing we have said has been intended to suggest that unions and employers have a privilege to incorporate the language of section 8(a)(3) of the NLRA into their collective bargaining agreements if the consequence is to mislead the employees. This language does not mean what it says, and if its inclusion without appropriate qualification misleads employees, either ***by itself*** or in conjunction with other misleading representations, the union cannot hide behind the fact that it is, after all, the words of Congress that it is repeating.

117 F.3d at 991 (emphasis added).

When the "plain meaning" of the words of a statute would lead "to absurd or futile results," or "merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,' this Court has followed that purpose, rather than the literal words." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)); *accord Perry v. Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966). It is irrational to hold, as *Electronic Workers*, *Nielsen*, and the Ninth Circuit here did, that Congress authorized unions and employers to couch compulsory unionism agreements in language the literal enforcement of which it prohibited. Such an interpretation of section 8(a)(3) also is plainly contrary to the Act's "policy of voluntary unionism" that is "implicit in § 8(a)(3)," *Pattern Makers v. NLRB*, 473 U.S. 95, 104-06 (1985). *See Buzenius*, 124 F.3d at 792-93.

Moreover, *Electronic Workers* and *Nielsen*—and thus the court of appeals here—misread *Beck*. *Beck* does not speak "only to the level of dues an employee may lawfully be required to pay under a union-security agreement," *Electronic Workers*, 41 F.3d at 1539; *accord Nielsen*, 94 F.3d at 1114-15. To the contrary, as the Second Circuit said in *dicta* in *Price v. Auto Workers Local 571*, in *Beck* "***bargaining for and entering into agreements*** which call for payments to support Union activities beyond those germane to collective bargaining ***were found to be violative of the Union's duty of fair representation***." 927 F.2d 88, 91 (2d Cir.) (emphasis added), *cert. denied*, 502 U.S. 905 (1991).

The Second Circuit accurately described *Beck*'s holding. *Beck* "delineated the precise limits § 8(a)(3) places on the ***negotiation*** and enforcement of union-security agreements." 487 U.S. at 745 (emphasis added). The Court granted certiorari in *Beck* "to resolve the important question concerning the ***validity of such agreements***." *Id.* at 741-42 (emphasis added). Significantly, one of section 8(a)(3)'s limits "on the ***negotiation*** . . . of union-security agreements" *Beck* acknowledged is that "the 'membership' that may be . . . required has been 'whittled down to its financial core.'" *Id.* at 745 (emphasis added) (quoting *General Motors*, 373 U.S. at 742). Moreover, *Beck* decided a

"claim that the union failed to represent [nonmembers'] interests fairly and without hostility by ***negotiating*** and enforcing an agreement that allows the exaction of funds for purposes that do not serve their interests and in some cases are contrary to their personal beliefs." *Id.* at 743 (emphasis added).

Thus, *Buzenius*, *Bloom*, and *Schreier* were correctly decided; and *Electronic Workers*, *Nielsen*, and the case here below were not.[10] SAG acted arbitrarily and in bad faith by

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[10] *Electronic Workers* also is distinguishable. *Electronic Workers* held that the union there did not act in bad faith by maintaining a union-shop clause that conformed to the "model clause" approved in *Keystone Coat, Apron & Towel Supply Co.*, 121 N.L.R.B. 880, 885 (1958). 41 F.3d at 1537-38. That "model clause" used the phrase "members in good standing." The court reasoned that the union could not have acted in bad faith, because the Board did not overrule *Keystone Coat* until *Electronic Workers*. *See* 41 F.3d at 1536, 1538.

SAG has no similar defense. In *Electronic Workers*, the court conceded that the NLRB was "free to reconsider its *Keystone Coat* policy in light of evolving Supreme Court precedent and to conclude that, in the future, unions will be found guilty of a duty-of-fair-representation violation if they adopt 'ambiguous' union-security provisions . . . without apprising employees of their rights under such provisions." *Id.* at 1538. That reconsideration occurred on May 28, 1993, when the NLRB, relying on *Beck*, explicitly overruled *Keystone Coat*'s model clause. *Electronic Workers Local 444*, 311 N.L.R.B. 1031, 1041 (1993), *rev'd in part on cross-petitions for review & enforcement*, 41 F.3d 1532 (D.C. Cir. 1994).

SAG did not enter into its collective bargaining agreement with Lakeside until July 1994. (Pet. App. at 23a.) By then, SAG had more than a year's notice from the Board's decision in *Electronic Workers* that it might breach its duty of fair representation by including the provision requiring membership in good standing. The D.C. Circuit's later decision in *Electronic Workers* is irrelevant, because that decision reversed only the Board's "retroactive application" of its new policy. *See* 41 F.3d at 1538; (*see also* Pet. App. at 9a (*Electronic Workers* held "that there was no showing of a bad faith breach of the duty of fair representation . . . because identical

(continued...)

negotiating a full membership requirement with Lakeside that was facially invalid under section 8(a)(3) as construed consistently by this Court since *Radio Officers* in 1954, and a full dues and fees requirement that was facially invalid under that section as authoritatively interpreted by the Court in *Beck* in 1988. Ms. Marquez, not SAG, was entitled to summary judgment on her claim that SAG breached the duty of fair representation by negotiating and maintaining an agreement that on its face misleadingly purported to require full membership and payment of the full dues and initiation fee required of a union member.

II. Ms. Marquez's Claim That SAG's Negotiation of the Misleading "Employment in the Industry" Requirement Breached the Duty of Fair Representation Is No Exception to the Federal Courts' Concurrent Jurisdiction Over Unfair Representation Claims.

The first proviso to NLRA section 8(a)(3) permits only compulsory unionism clauses in which "***an employer*** . . . require[s] as a condition of employment membership . . . on or after the thirtieth day following the beginning of ***such*** employment." 29 U.S.C. § 158(a)(3), 1st proviso (emphasis added). Consequently, employees have a statutory, thirty-day grace period with every employment relationship.

An employee "'*who has become delinquent in dues under a contract covering one bargaining unit cannot be denied employment under a contract covering another bargaining unit* without affording him the statutory grace period in which to become current in his or her dues.'" *NLRB v. Iron Workers Local 433*, 767 F.2d 1438, 1442 (9th Cir. 1985) (quoting *Iron Workers Local 118*, 257 N.L.R.B. 564, 566 (1981), *enforced per curiam*, 720 F.2d 1031 (9th Cir. 1983)). Moreover, an employee has a right to a new grace period when an employer rehires him

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[10] (...continued)
union security provisions had never ***previously*** been found to be 'ambiguous' or misleading") (emphasis added)).

or her unless the employee was delinquent in dues when previously employed by that employer. *Carpenters Local 740*, 238 N.L.R.B. 159, 160-61 (1978).

The agreement between SAG and Lakeside required "as a condition of employment [by Lakeside] membership in the Union . . . thirty (30) days after [a person's] first employment as a performer ***in the motion picture industry***." (J.A. at 28-29 (emphasis added).) Thus, the agreement misrepresented employees' obligations, denying them the separate thirty-day grace period with each employment that is their statutory right, unless they were delinquent in their dues obligations in a prior employment with the same employer.

The Board held a similar clause facially invalid in *Theatrical Stage Employees Local 644*, 259 N.L.R.B. 1415 (1982). That clause required all cameramen employed by a producer to join the union "'not later than the 31st day following the beginning of their first employment,'" defined as "'the first such employment for producers under contract with Local 644.'" *Id.* at 1418. The NLRB held that the clause "clearly contravenes the statutory intent of Section 8(a)(3) of the Act," because it does "not provide for the statutory 30-day waiting period before requiring union membership." *Id.* at 1416, 1422. With "respect to any employee who . . . has completed 31 days of employment with any employer subject to its provisions, the provision constitutes a[n unlawful] closed shop and a bar to employment unless that employee continues to remain a member of the Union in good standing." *Id.* at 1422.

The agreement here says that the employment-in-the-industry clause "has been approved by an advisory opinion of the General Counsel of the [NLRB]." (J.A. at 31.) However, no procedure exists for obtaining "advisory opinions" from the NLRB concerning the validity of collective-bargaining provisions. The so-called "advisory opinion" is "an informal opinion only," expressed in 1948 by an Acting Regional Director's telegram. Moreover, that telegram said it "is not to be deemed an official interpretation or ruling of the General Counsel nor a

commitment with respect to the disposition of any unfair labor practice charges that may subsequently be filed." (*Id.* at 45-46 (capitalization altered).) After the NLRB's later contrary holding in *Theatrical Stage Employees Local 644*, SAG's reliance on that equivocal, informal opinion was, at the least, arbitrary.

Ms. Marquez's Complaint alleges that SAG breached its duty of fair representation by negotiating a compulsory unionism provision that did not provide a thirty-day grace period after employment by Lakeside before any obligations to the union arose. (J.A. at 9-10.) The court of appeals held that this claim "is preempted by the NLRB's exclusive jurisdiction" over arguable unfair labor practice claims. (Pet. App. at 10a-13a.) Yet, simultaneously, by deciding it, the court of appeals recognized that the district court had jurisdiction over Ms. Marquez's parallel claim that SAG breached the duty of fair representation by negotiating a compulsory unionism provision that "requires covered actors to be members of the union in good standing." (*See id.* at 6a-10a.)

The court of appeals correctly exercised jurisdiction over the latter claim, because the duty of fair representation "applies to all union activity, including contract negotiation," *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991); *see Beck*, 487 U.S. at 743. There are no exceptions to the rule that NLRB preemption "does not extend to suits alleging a breach of the duty of fair representation." *See Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 74-78 (1989).

Specifically, this Court in *Beck* held that the federal courts have jurisdiction over a claim that a union breached the duty of fair representation by negotiating and enforcing a compulsory unionism provision that required employees to pay full union dues in violation of section 8(a)(3)'s prohibition on "the exaction of fees beyond those necessary to finance collective-bargaining activities." *See* 487 U.S. at 742-44. That claim was not within the NLRB's exclusive jurisdiction, although the unions' conduct in *Beck* was both an unfair labor practice under section 8(b)(2) of the NLRA, 29 U.S.C. § 158(b)(2) (1988), and a breach of the

duty of fair representation. *See Beck*, 487 U.S. at 745 & n.2; *Abrams v. Communications Workers*, 59 F.3d 1373, 1377 & n.3 (D.C. Cir. 1995). Therefore, that SAG's "employment in the industry" clause also violates sections 8(a)(3) and 8(b)(2) does not establish that Ms. Marquez's claims regarding that clause are not judicially cognizable claims of unfair representation.

No principled basis exists for distinguishing the claim the court of appeals adjudicated—that a union breached the duty of fair representation by negotiating a provision that on its face allegedly misleads employees about the ***extent*** of their lawful obligations to the union—from the claim it held to be pre-empted—that a union breached the same duty by negotiating another provision of the same agreement that allegedly misinforms employees about ***when*** those obligations lawfully begin. *Cf. Abrams*, 59 F.3d at 1380-81 (holding that a union would violate the duty of fair representation if it collected full agency fees before new hires received notice of their right to pay only the *Beck* amount). The court of appeals' decision, thus, is internally inconsistent and contrary to *Beck*.

Moreover, the court of appeals' decision on this issue is internally inconsistent and contrary to *Beck* in another respect. The court also acknowledged jurisdiction over Ms. Marquez's claims that SAG's statements outside the collective bargaining agreement breached the duty of fair representation by misleading her about ***when*** her obligations under section 8(a)(3) began ***by enforcing a policy that "required pre-payment of the dues before Marquez would be cleared to perform."*** The court of appeals recognized this jurisdiction by remanding the case to the district court for further proceedings on that as-applied claim. (*See* Pet. App. at 15a-16a (emphasis added).)

In *Wegscheid v. Auto Workers 2911*, the Seventh Circuit explicitly rejected the artificial distinction, made by the court of appeals here, between claims that the terms of a collective bargaining agreement misstate employees' obligations under section 8(a)(3) and claims that a union's statements outside the agreement about those same obligations are misleading:

> If an alleged violation of section 8(a)(3) is litigable in a district court suit challenging statements made outside the collective bargaining agreement as a breach of the union's duty of fair representation, and it is, we cannot think of any reason why it should not be litigable if the statements happen to be contained in the collective bargaining agreement, since the union's duty of fair representation can be violated by union conduct in the negotiation of a collective bargaining agreement, as well as in the enforcement of it.

117 F.3d 986, 989 (7th Cir. 1997) (citations omitted). The Seventh Circuit's logic is unassailable. Indeed, the breach is more obvious in the collective bargaining agreement's case, because that is the formal statement of the union's policy.

Moreover, as the Seventh Circuit also recognized in *Wegscheid*, sound policy reasons exist for permitting Ms. Marquez to challenge in this action the "employment in the industry" clause's limitation on her fundamental statutory right to freedom of association:

> since the [court of appeals] doesn't question the district court's jurisdiction over . . . the count complaining about statements made by the union's [agents] to the plaintiff[], the implication of the [court of appeals'] position is that to challenge both those statements and the language of the union-shop clause the plaintiff[was] required to proceed in two forums—the district court and the Labor Board—or else surrender [her] judicial claim and proceed exclusively before the Board.

Id. at 989.

The court of appeals here in part justified its finding of NLRB preemption by observing that the "factually complex question of how properly to apply § 8(a)(3)'s requirements to hiring practices in the motion picture industry is precisely the kind of question that we think the NLRB was designed to address." (Pet. App. at 13a.) However, this is not a factually complex issue. It is a simple question of statutory interpretation. *See Theatrical Stage Employees Local 644*, 259 N.L.R.B. at 1416, 1422.

"Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); *accord United States v. Smith*, 499 U.S. 160, 167 (1991). Congress has specified only one exception to section 8(a)(3)'s prohibition against enforcement of compulsory unionism provisions until after employees have had a thirty-day grace period with every employment relationship. *See* 29 U.S.C. § 158(f) (1988) (building and construction industry exception). Congress has made no exception for the entertainment industry, nor is there any evidence that it intended to do so.

Thus, hiring practices in the motion picture industry are irrelevant in applying the thirty-day grace period requirement, as the NLRB recognized in *Theatrical Stage Employees Local 644*, 259 N.L.R.B. at 1422.[11] Neither the courts nor the Board may make an exception to section 8(a)(3) that Congress itself has not made. *See American Guild of Variety Artists*, 163 N.L.R.B. 457, 469 (1967), *enforced per curiam*, 420 F.2d 311 (5th Cir. 1969) (only Congress can grant an exemption from section 8(a)(3) based on "the peculiarities of [the entertainment] industry").

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[11] Those hiring practices cut both ways, of course. Congress may well have concluded that application of the 30-day grace period to the entertainment industry is fair, because it avoids the situation here, in which a short-term employee is compelled to pay dues and an initiation fee that consume most, if not all, of his or her pay.

The NLRB's expertise also is irrelevant to the question of the district court's jurisdiction to decide Ms. Marquez's unfair representation claim concerning the "employment in the industry" clause. There are no exceptions to the rule that NLRB preemption "does not extend to suits alleging a breach of the duty of fair representation," whatever "the subject matter of the fair representation claim presented, ***the relative expertise of the NLRB in the particular area of labor law involved***, or any other factor." *Breininger*, 493 U.S. at 74-76 (emphasis added).

In sum, the courts below erred in not exercising jurisdiction over this claim and should have held that SAG's negotiation and maintenance of the "employment in the industry" clause breached its duty of fair representation.

III. Because Contract Reformation or Expunction Is the Appropriate Relief for a Misleading Compulsory Unionism Provision, the Employer Is a Necessary Party.

In *Bloom v. NLRB*, the Eighth Circuit held that "an adequate remedy" for a "misleading" and "overly broad" compulsory unionism clause "requires expunction of the offending clause." 30 F.3d 1001, 1004-05 (8th Cir. 1994); *accord Schreier v. Beverly Cal. Corp.*, 892 F. Supp. 225, 227 (D. Minn. 1995) (same holding in a suit for breach of the duty of fair representation). In *Buzenius v. NLRB*, the Sixth Circuit ruled "that the Board abused its discretion in refusing to order that the clause requiring that employees be 'members of the Union in good standing' either be modified to define that requirement or be removed from the CBA." 124 F.3d 788, 793 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3427 (U.S. Dec. 8, 1997) (No. 97-945).

Ms. Marquez here asked for precisely that relief, *i.e.*, an

> injunction which requires SAG and Lakeside to expunge any provisions from their collective bargaining agreements . . . which require employees to be members as a condition of

> their employment, which impose membership or financial obligations upon employees during the first 30 days of their employment, and which require employees after the expiration of 30 days of employment to pay amounts which exceed a pro rata share of SAG's costs of "collective bargaining, contract administration, and grievance adjustment."

(J.A. at 11.) Clearly, any such reformation of the contract cannot be compelled if Lakeside is not a party to this case.

Nonetheless, the court of appeals dismissed Lakeside, holding that Lakeside is not "a necessary party to obtain full relief through contract reformation, as the facial challenge to the CBA does not survive." (Pet. App. at 20a.) The Seventh Circuit reached precisely the opposite conclusion in *Wegscheid*, holding that, although the plaintiffs' facial claims were moot there, the employer "should not have been dismissed from the case, since the plaintiffs were asking the court to order a change in a contract to which [it] is a party." 117 F.3d at 988 (citing Fed. R. Civ. P. 19(a)(1) and cases).

Wegscheid's ruling is consistent with this Court's holding in *Glover v. St. Louis-San Francisco Ry.* that "federal courts may . . . properly exercise jurisdiction over ***both*** the union and the railroad" in a suit for breach of the duty of fair representation, if "the employer is made a party to insure complete and meaningful relief." 393 U.S. 324, 329 (1969) (emphasis added). It also is consistent with the "general rule" under Federal Rule of Civil Procedure 19(a)(1) that "all parties to a contract will be necessary in an action to set aside the contract." 4 James W. Moore et al., *Moore's Federal Practice* § 19.06[4], at 19-109 (3d ed. 1998); *see Shields v. Barrow*, 58 U.S. (17 How.) 130, 139-40 (1855).

Lakeside did not oppose the grant of certiorari here. It also has informed Ms. Marquez's counsel that it does not intend to

file a brief or participate in oral argument. *See supra* p. ii. Thus, Lakeside does not now oppose the courts' exercise of jurisdiction over it for the limited purpose of declaring invalid the contract provision it negotiated with SAG and ordering that provision modified or expunged. Because Lakeside is a necessary party for the relief that is appropriate on both claims at issue here, the Court should reverse the dismissal of Lakeside if Ms. Marquez prevails on either of the first two Questions Presented.

CONCLUSION

One of the NLRA's core policies is that of "voluntary unionism." *See Pattern Makers v. NLRB*, 473 U.S. 95, 104-07 (1985). Consequently, the Act "provide[s] only the most grudging authorization of [union-security] provisions," *Beck*, 487 U.S. at 755, limiting the union obligations that such provisions may impose to payment of collective bargaining costs. The court of appeals' decision violates the Act's policy of voluntary unionism and eviscerates its limits on compulsory unionism by, to put it bluntly, allowing employers and unions to lie to employees in collective bargaining agreements about the extent of the employees' obligations and when those obligations begin.

The judgments below should be reversed on all Questions Presented and remanded for the entry of summary judgment for Ms. Marquez on her claims that SAG breached its duty of fair representation by negotiating and maintaining an agreement that misleadingly stated conditions of employment that cannot lawfully be enforced—full membership, payment of full dues, and payment before thirty days of employment by Lakeside. The remand should include instructions that the district court order SAG and Lakeside to modify their current "union security"

provision so that it no longer overstates the obligations imposed, or to expunge that provision completely.

Respectfully submitted,

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